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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481

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6 In the Matter of:

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8 DELPHI CORPORATION,

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10 Debtor.

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13

14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 November 29, 2007

19 10:08 AM

20

21 B E F O R E:

22 HON. ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

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2 HEARING re Expedited Motion for Orders Under U.S.C. Section 363
3 and Fed. R. Bankr. P. 2002, 6004 and 9014; (A)(i)Approving
4 Bidding Procedures; (ii)Granting Certain Bid Protections;
5 (iii)Approving Form and Manner of Sale Notices; and (iv)Setting
6 Sale Hearing Date; and (B)Authorizing and Approving Sale by
7 Delphi Automotive Systems LLC and Delphi Technologies, Inc. of
8 Certain Equipment and Other Assets Primarily Used in Debtor's
9 Saginaw Chassis Business Free and Clear of Liens

10

11 HEARING re Motion of Verizon Services Corp. for Payment of
12 Administrative Expense Claim Pursuant to MobileAria Sale Order
13

14

15 HEARING re Twenty-second Omnibus Claims Objection Pursuant to
16 U.S.C. Section 502(b) and Fed. R. Bankr. P. 3007 to Certain
17 (A)Duplicate or Amended Claims; (B)Equity Claims;
18 (C)Insufficiently Documented Claims; (D)Claims Not Reflected on
19 Debtors' Books and Records; (E)Untimely Claims; and (F)Claims
20 Subject to Modification, Tax Claims Subject to Modification,
21 Modified Claims Asserting Reclamation, Claims Subject to
22 Modification that are Subject to Prior Orders and Modified
23 Claims Asserting Reclamation that are Subject to Prior Orders

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Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

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THE COURT: Please be seated. Okay. Delphi
3 Corporation?

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MR. BUTLER: Your Honor, good morning. Jack Butler
5 and Kayalyn Marafioti from Skadden Arps here on behalf of the
6 debtors for their twenty-fifth omnibus hearing. We have filed
7 and served a proposed agenda and we propose to move to the
8 agenda in that order.

9

THE COURT: That's fine.

10

MR. BUTLER: Your Honor, relating to the first three
11 matters on the agenda, agenda item matter number 1, is
12 solicitation and procedures motion at docket number 9266.
13 Matter number 2, which is the proposed amendment to the --
14 excuse me. Number 2 is actually the adjournment motion by the
15 equity committee at docket number 10795. And matter number 3,
16 which is the Delphi Appaloosa investment agreement amendment
17 motion, at docket number 10760. Based on a chambers conference
18 held yesterday, which all of the objectors to those motions
19 participated, those matters have been adjourned for hearing
20 until 10 a.m. on December 6th. We've filed-- made this notice
21 on this agenda and filed this publicly and served it on the
22 2002 list as well as the masters service list.

23

THE COURT: Okay. That's fine.

24

MR. BUTLER: Matter number 4 on the agenda, Your
25 Honor, is the debtor's motion for a default judgment against

1 Mr. Furukawa.

2 MR. BERGER: Good morning, Judge. Neil Berger --

3 THE COURT: Good morning.

4 MR. BERGER: -- Togut, Segal and Segal. Your Honor,
5 we served a counterclaim, a claim for affirmative relief
6 against Furukawa. The debtors applied for a default judgment.
7 Furukawa responded. We have been actively engaged with
8 Furukawa's new counsel. We hope in the next couple of days to
9 submit a discovery stipulation and order to Your Honor to move
10 to the substantive matters. This matter is being adjourned to
11 the December 11th hearing. Hopefully, it's a place hold, Your
12 Honor, and we can get to real discovery and get to the
13 (indiscernible) of the matter.

14 THE COURT: Okay. That's fine.

15 MR. BUTLER: Your Honor, matter number 5 is the
16 Saginaw Chassis asset sale motion. This is the sale hearing.
17 The motion was filed at docket number 9368. Your Honor
18 previously approved the bidding procedures and bid protection
19 order at docket 10958. Under that order, this matter was to
20 come for hearing either today or next month depending on
21 whether alternative bids were received. No bids were received
22 by the bid deadline and therefore pursuant to Your Honor's
23 prior order, this is now ripe for consideration by the Court in
24 terms of the sale.

25 THE COURT: Okay.

1 MR. BUTLER: Your Honor, this motion which we
2 presented earlier to you at our last omnibus hearing deals with
3 the sale of the Saginaw Chassis assets free and clear of all
4 liens for approximate consideration of 42.6 million dollars.
5 Your Honor may recall from the prior hearing that a portion of
6 that is allocated to assets and another portion is allocated to
7 general assets. And another portion is allocated to inventory.
8 And a final portion element of it is reimbursement of expenses
9 because the Canadian assets are now being -- we're required --
10 company transaction are now being relocated by the debtors for
11 the purchaser's benefit.

12 There is, Your Honor, in connection with this, an
13 evidentiary index. Very briefly, the debtor's declaration is
14 Exhibit 1. The agreements, including all the amendments are
15 Exhibits 2 and 3. The court documents relating to this sale
16 are Exhibits 4 through 11 and all the appropriate service
17 notices are Exhibits 12 through 14. I'd like to move those
18 matters into evidence.

19 THE COURT: Okay. Any objection to that? All right.
20 Those are admitted.

21 (Debtor's Exhibit 1, debtor's declaration in connection with
22 Saginaw Chassis asset sale motion, was hereby received into
23 evidence, as of this date.)

24 (Debtor's Exhibits 2, 3, Saginaw Chassis asset sale motion
25 agreements, including all amendments, were hereby received into

1 evidence, as of this date.)

2 (Debtor's Exhibits 4-11, court documents relating to Saginaw
3 Chassis asset sale, were hereby received into evidence, as of
4 this date.)

5 (Debtor's Exhibit 12-14, all service notices relating to
6 Saginaw Chassis asset sale, were hereby received into evidence,
7 as of this date.)

8 MR. BUTLER: And Mr. Sheehan's available for cross-
9 examination or for any questions the Court may have.

10 THE COURT: Okay. Well, I saw no objections to the
11 relief and I've reviewed the declaration as well as the
12 agreement and I don't have any questions.

13 MR. BUTLER: Okay. Thank you, Your Honor. Your
14 Honor, the only other items I would indicate for the record in
15 addition to the evidentiary record is that I just do want to
16 say that Delphi has had discussions with the UAW regarding
17 their review of this agreement. There was a concern with
18 respect to a specific provision of the agreement, Section 9.1.C
19 of the agreement, that the debtors could waive the purchaser's
20 requirement to assume the obligation of the collective
21 bargaining agreements as a condition of closing. We've given
22 assurances to the UAW that Delphi would not waive this
23 condition to closing without first obtaining the UAW's
24 concurrence.

25 THE COURT: Okay.

1 MR. BUTLER: That was the element of our discussions
2 with them. I just wanted to say that on the record.

3 Otherwise, Your Honor, unless you have any questions,
4 we would present the matter for Your Honor's review based on
5 the papers and the other --

6 THE COURT: When is the closing expected to occur?

7 MR. BUTLER: I think, Your Honor, promptly after the
8 order becomes final.

9 MR. BALY (TELEPHONICALLY): Your Honor, --

10 MR. BUTLER: January 2nd is the actual date, Your
11 Honor. Sorry.

12 THE COURT: Okay. I think we have counsel for the
13 purchaser on the phone.

14 MR. BATY (TELEPHONICALLY): Yes. I'm sorry, Your
15 Honor. Again, Donald Baty on behalf of TRW (indiscernible)
16 Systems. The agreement is set to close on January 2nd.

17 THE COURT: Okay. And people here are not in
18 agreement with you. All right. And as I recall, that was one
19 of the reasons to have this heard today so that could occur.

20 MR. BUTLER: Yeah. And actually, Your Honor, even
21 though what I had said at the last hearing, this, as Your Honor
22 I think is aware, this particular transaction has been a long
23 time baking and it really focused around resolving matters with
24 General Motors in terms of the supply agreement. And there
25 was, I think, on the purchaser a justifiable desire that once

1 that agreement finally was achieved that they wanted the
2 certainty of knowing they can proceed with this transaction.
3 So even though the closing may actually be closing on January
4 2nd, the commitment we made to the purchaser when we presented
5 the original bidding procedures motion was that if there -- was
6 to bifurcate the process in such a way that if there were no
7 competitive offers made -- which is not, by the way, Your
8 Honor, a complete surprise to the company because this
9 disposition does relate and the value is associated, among
10 other things, with the supply agreement with General Motors and
11 the sale -- and the union agreement so that ultimately it's not
12 a complete surprise that given the fact there's been an
13 agreement with General Motors and the purchaser here that they
14 would be the successful purchaser.

15 THE COURT: Right. Okay. Does anyone else have
16 anything to say on this motion? All right. I will approve the
17 motion then under Sections 363(b) and (f).

18 MR. BUTLER: Thank you, Your Honor. And you're free
19 to stay on the phone, sir, but if you want to you, you can ring
20 off.

21 MR. BATY (TELEPHONICALLY): Thank you.

22 THE COURT: Okay.

23 MR. BUTLER: Your Honor, matter number 6 is the
24 Verizon administrative expense motion claim at docket number
25 9596 and Mr. Berger has also handled this matter for Delphi.

1 THE COURT: Okay.

2 MR. LADDIN: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. LADDIN: Daryl Laddin of Arnall Golden & Gregory
5 on behalf of Verizon Services Corporation. We are here today
6 on the motion of Verizon seeking payment for the sum of 479,000
7 dollars. We view this today, Your Honor, as a status
8 conference or scheduling conference --

9 THE COURT: Can you say that number again?

10 MR. LADDIN: \$479,532.61.

11 THE COURT: And that's a lesser number than the
12 numbers in your papers but that's because of credits you've
13 received or amounts you've received?

14 MR. LADDIN: Yeah. Your Honor may recall from the
15 sale hearing and the sale order that was entered that the
16 amount that was reserved for potential, quote unquote, Schedule
17 3 disputes was 700,000 dollars. The actual damages that have
18 been incurred are over 800,000 dollars but Verizon has also
19 been paid over 200,000 dollars. So while we would like to seek
20 the full 800,000 dollars that Verizon has lost, what we're
21 entitled to seek, we believe, under the sale order is only the
22 479,000 which is, again, the difference between 700,000 and
23 what Verizon was in fact paid for these, quote unquote,
24 Schedule 3 disputes.

25 THE COURT: Okay. And I'll ask Mr. Berger this but

1 my understanding was that the debtor contends that at least
2 some of those payments were mistaken and you may want them
3 back?

4 MR. BERGER: Yes, Judge.

5 THE COURT: So if that's the case, you're seeking
6 more than -- you're disputing the right to have those --
7 whatever payments the debtor wants back, you're disputing the
8 right to get those back, too?

9 MR. LADDIN: That is absolutely right and --

10 THE COURT: Okay.

11 MR. LADDIN: -- you know, I will note while that
12 would be the equivalent of a compulsory counterclaim, they've
13 only, quote unquote, reserved their rights to seek to recover
14 that money. They haven't actually asked the Court -- they
15 haven't filed the equivalent of the counterclaim which I think
16 obviously they would need to do in this proceeding in order to
17 get that money back.

18 The -- I can go into some of the factual detail if
19 Your Honor would like. Obviously the motion was fairly
20 detailed itself as well as the reply that we filed.

21 THE COURT: Okay. I think I really only have one
22 question which is on the issue of the main dispute, which is
23 can you identify to me any contractual provision that supports
24 your claim?

25 MR. LADDIN: There are two points with respect to

1 that, Your Honor. First, what MobileAria contends in its
2 factual recitations is a disagreement with Verizon over what
3 the specifications were that Verizon provided to MobileAria.
4 And MobilAria contends in its declaration that it followed
5 Verizon's specifications. The contract itself provides in
6 Section 18, and this is in our papers, that "MobileAria
7 recognizes that the product and services which are to be
8 provided under this agreement are vital to Verizon and must be
9 delivered and installed without interruption, delay, cessation
10 or limitation and in full compliance with the scheduled
11 development dates" -- excuse me -- "developmental dates and
12 requirements set forth in the orders and performed in full
13 compliance with the specifications." They contend that they
14 did comply with those specifications --

15 THE COURT: Well, where are the specifications
16 designated?

17 MR. LADDIN: The specifications, Your Honor, is a
18 defined term in the agreement. First of all, there are the
19 orders. It has to comply with the requirements set forth in
20 the Order's, capital O, defined term and comply with the,
21 capital S, Specifications. "An Order is a purchase order" --
22 and this is in the definition section -- "An Order is a
23 purchase order or other written communication and/or electronic
24 transmission the customer may deliver to supplier for the
25 purchase of product and/or service." And Specifications is

1 defined to mean -- lower case -- "specifications for the
2 product or services set forth in an order as well as suppliers'
3 then current published specifications and documentation and
4 applicable industry and governmental requirements." Here, a
5 fundamental specification that was communicated to MobileAria
6 in writing in the order submitted and also in -- at the outset
7 of this contract and before the contract was entered into was
8 that these units needed to stay within two megs of usage. That
9 was what had been provided to Verizon by its prior supplier,
10 which was At Road. It was a fundamental cost component that
11 was in fact provided.

12 THE COURT: Do you have any order that says that?

13 MR. LADDIN: All of the orders will indicate whether
14 they're going to be activated under the two meg plan or under
15 an unlimited plan. So, yes, the orders will provide that.

16 Secondly, the fundamental --

17 THE COURT: That's a different point, I think.

18 MR. LADDIN: Well, they have to comply with the
19 speci --

20 THE COURT: Whether they're activated under one plan
21 or another is separate from saying that they cannot exceed two
22 megs.

23 MR. LADDIN: Well, the specification is you have to
24 comply with two megs. The specification is for a two-meg plan
25 and it says you've got to meet the specifications. It's two

1 megs. And this was a -- this was a fundamental issue from
2 Verizon's perspective. This was --

3 THE COURT: Why doesn't it appear anywhere in the
4 agreement then?

5 MR. LADDIN: Pardon?

6 THE COURT: Why doesn't it appear anywhere in the
7 agreement then?

8 MR. LADDIN: Because -- Your Honor, because it was --
9 first of all, because it was such a given that it was --

10 THE COURT: This is about a 100-page agreement.

11 MR. LADDIN: That's true. That's true. But, Your
12 Honor, the fundamental principle of contract law --

13 THE COURT: Is there anyone who's saying this besides
14 you?

15 MR. LADDIN: I'm sorry?

16 THE COURT: Is there any employee affidavit, any
17 factual indication of this at all?

18 MR. LADDIN: Yes. Absolutely, Your Honor.

19 THE COURT: Where?

20 MR. LADDIN: I realize that they raise the issue in
21 their surreply which is something that's not permitted under
22 the rules and was outside the agreement on briefing between
23 myself and counsel. But --

24 THE COURT: I would have come up with the same point
25 because I usually review proofs of claim for the documentation

1 in support.

2 MR. LADDIN: Your Honor, there is no question that at
3 an evidentiary hearing that I will have a witness here who will
4 testify to that.

5 THE COURT: But I'm talking about a piece of paper, a
6 contract.

7 MR. LADDIN: The order --

8 THE COURT: Do you have anything that specifies a cap
9 on the megahertz in writing?

10 MR. LADDIN: There are communications between the
11 clients with respect to the two megs. And --

12 But the second point, Your Honor -- and I realize
13 Your Honor is focused on this issue. But the second point is
14 that the fundamental principle of contract law is to force the
15 intent of the parties. And there's nothing in this contract
16 that says that MobileAria can apply a pig in a poke.
17 Effectively, what their argument is is that they could provide
18 a product that had a million megs of usage which would be
19 ridiculous. But that is where that argument leads and it's
20 what leads them to claim what the specifications were that were
21 provided by Verizon. And the law in New York, as elsewhere, is
22 pretty clear on contract interpretation. It says that
23 extrinsic evidence that shows a latent ambiguity and what the
24 parties intended is admissible. And it's also a fundamental
25 principle of contract law that when a contract is either

1 ambiguous, incomplete -- and granted, there's no question, Your
2 Honor, that specific term isn't in here.

3 THE COURT: Which term?

4 MR. LADDIN: Within this written document. "Where a
5 contract is ambiguous or incomplete or uncertain as to the
6 intention of the parties, the Court is to consider extrinsic
7 evidence as to the surrounding matters and circumstances
8 including the additional terms that were not included in the
9 writing in order to determine the intent."

10 Now, I can --

11 THE COURT: Well, but again, I think you're hanging
12 your hat -- and having read through the agreement, I think it
13 is the only place to hang it, on the definition of the word
14 "specifications"? And that says "shall mean specifications for
15 the product" -- by the way, there's nothing in the description
16 of the product that specifies, as far as I can see, a cap on
17 megahertz. Well -- or of the service. And that's including in
18 the exhibits to the agreement, Exhibits B and G and the like.

19 "As set forth in an order". So that's a -- an order
20 is defined in paragraph 8, as well as in the Defined Terms, and
21 it says "as well as suppliers", then current published,
22 specifications and documentation and applicable industry and
23 government requirements."

24 So I don't see why I should be listening to any
25 parole evidence on this. There's the orders and, although

1 you're not relying on it, published specifications and
2 documentation of the supplier.

3 MR. LADDIN: "An order is a purchase order or other
4 written communication delivered to the supplier."

5 THE COURT: Right.

6 MR. LADDIN: That would be extrinsic evidence that's
7 outside the four corners of this document.

8 THE COURT: Well, no. It's incor -- but where -- but
9 I don't see the order. Where's the order?

10 MR. LADDIN: We don't have them here today. This
11 isn't an evidentiary hearing. We had agreed with counsel --

12 THE COURT: But this is a document. It's just a
13 document. It's part of the contract.

14 MR. LADDIN: An order -- orders were submitted
15 subsequent to execution of this document.

16 THE COURT: Right.

17 MR. LADDIN: Okay.

18 THE COURT: Do the orders specify that there's a cap
19 on the megahertz?

20 MR. LADDIN: I believe that the orders state -- and I
21 don't have the orders with me so I cannot say precisely what
22 those orders state. But my understanding is --

23 THE COURT: Well, I'm not -- that doesn't cut it.

24 MR. LADDIN: What I've been told is --

25 THE COURT: That doesn't cut it either.

1 MR. LADDIN: What they state, Your Honor, is --

2 THE COURT: But you don't know.

3 MR. LADDIN: They state that --

4 THE COURT: And it's not before me.

5 MR. LADDIN: But, Your Honor --

6 THE COURT: I'm going to give you one more chance on
7 this because I don't like motions for reargument and rehearing.
8 This motion is woefully short of any factual support. But for
9 this argument about specifications, the major claim would be
10 subject to dismissal on the papers because there's nothing in
11 the contract that gives you a right to this except for this
12 definition of specifications. I'll hear from Mr. Berger but my
13 inclination is to have you adjourn this so that you can make a
14 real motion with the real documents attached as you would to a
15 proof of claim. And a real affidavit from a real client that
16 lays out the elements of the other claim. And so we're not
17 spent here just sort of speculating and the debtor doesn't have
18 to go through a discovery process before you've established the
19 elemental basis for asserting a claim in a bankruptcy court.
20 Which is not some lawyer saying I've been told this, that and
21 the other thing but a client saying this is what happened,
22 under oath, and submitting the agreement that supports it.

23 MR. LADDIN: And, Your Honor, if we do go through the
24 extra briefing that Your Honor is --

25 THE COURT: It's not briefing.

1 MR. LADDIN: Motion. Excuse me.

2 THE COURT: It's not briefing. I don't want to hear
3 from lawyers.

4 MR. LADDIN: Understood.

5 THE COURT: I want the claim.

6 MR. LADDIN: Understood. Additional file. We will
7 also include in there the law with respect to the extrinsic
8 evidence that the Court can and should --

9 THE COURT: I'll give you the law right now 'cause I
10 have it and I'll cite it to you. All right? In fact, you can
11 look at it. But let me hear from Mr. Berger first.

12 MR. BERGER: Briefly, Your Honor -- sorry.

13 THE COURT: We all have a cold, I see.

14 MR. BERGER: I have to be brief. We appreciate and
15 embrace Your Honor's observations. We've asked the same
16 questions. I don't need law. I need documents. If there's
17 definitive documents and we can look at them and research them,
18 we will. What I'd ask Your Honor is that the motion either be
19 withdrawn without prejudice or denied without prejudice and a
20 new document filed that we can respond to.

21 THE COURT: Well, I think that you would need to have
22 a suitable time to respond to the proof of claim.

23 MR. BERGER: Yes.

24 THE COURT: My hope is, if there is a proof of claim,
25 that actually -- a proof of administrative claim, that actually

1 sets forth the factual basis, you will be able to reconcile it
2 and negotiate as you have with ninety-nine percent of all the
3 other claims filed and, frankly, with everyone except for
4 basically pro se claimants, some of whom have wanted to appear
5 in court.

6 MR. BERGER: We commit to Your Honor that if we get
7 that information, we will look at it and we will negotiate with
8 counsel business to business people as well.

9 THE COURT: Okay. Now as far as contract
10 interpretation, "Under the law of New York, a written contract
11 is to be interpreted so as to give effect to the intention of
12 the parties expressed in the unequivocal language they've
13 employed." Cruden v. Bank of New York, 957 F.2d 961, 976 (2d
14 Cir. 1992) "Under New York law, if a contract is unambiguous
15 on its face, its proper construction is a question of law."
16 Metropolitan Life Insurance Company v. RJR Nabisco, Inc., 906
17 F.2d 884, 889 (2d Cir. 1990) "The Court should not look beyond
18 the confines of the contract to extrinsic evidence if its
19 relevant provisions are plain and unambiguous." W.W.W.
20 Associates, Inc. v. Giancontieri, 77 NY2d 157, 162 (1990)
21 "When parties set down their agreement in a clear complete
22 document, their writing should be enforced according to its
23 terms." Vermont Teddy Bear Company, Inc. v. 538 Madison Realty
24 Co., 1 NY3d 470, 475 (2004) "This is particularly appropriate
25 if the contract was negotiated between sophisticated counsel

1 business people negotiating at arms length." (Id.) In such
2 circumstances, "Courts should be extremely reluctant to
3 interpret an agreement as impliedly stating something which the
4 parties have neglected to specifically include. Hence, Courts
5 may not, by construction, add or excise terms nor distort the
6 meaning of those used and thereby make a new contract for the
7 parties under the guise of interpreting the writing." (Id.)
8 See also Wallace v. 600 Partners Co., 86 NY2d 543, 548 (1995).
9 "Given the terms of the contract, their plain meaning, a Court
10 should find contractual provisions ambiguous only if they are
11 reasonably susceptible to more than one interpretation by
12 reference to the contract alone." Krumme v. Westpoint Stevens,
13 Inc., 238 F.3d 133, 139 (2d Cir. 2000); Burger King Corporation
14 v. Horn & Hardart Co., 893 F.2d 525, 527 (2d Cir. 1990).
15 "Contract language is unambiguous if it has a definite and
16 precise meaning unattended by danger of misconception in the
17 purport of the contract itself and concerning which there is no
18 reasonable basis for a difference of opinion." Metropolitan
19 Life Insurance v. RJR Nabisco, 906 F.2d 889 "Language whose
20 meaning is otherwise plain is not ambiguous merely because the
21 parties urge different interpretations in the litigation.
22 (Id.) See also Lee v. BSB Greenwich Mortgage L.P., 267 F.3d
23 172, 179 (2d Cir. 2001). "Any ambiguity in a contract must
24 emanate from the language used in the contract rather than from
25 one party's subjective perception of the terms."

1 Consequently, I believe your contract which, again,
2 is fifty some pages with an additional -- roughly fifty pages
3 of single-spaced specifications and exhibits must be read as
4 written. And that one should particularly follow the following
5 quote from Vermont Teddy Bear at 476: "The logic of the
6 proposition that a term is clearly contrary to a party's
7 financial interest does not justify judicial insertion of a
8 contract term." See also Rowe v. Great Atlantic and Pacific
9 Tea Co., 46 NY2d 62, 72 (1978). "Courts should be extremely
10 reluctant to interpret an agreement as impliedly stating
11 something the parties have neglected to specifically include.
12 Such lack of foresight does not create rights or obligations."

13 So again, I really think the focus is on the order or
14 the orders and what they say. And in that regard, I note that
15 the integration provision in paragraph 55 cross-referenced
16 paragraphs 8 and 13 and put limitations -- or recognized
17 limitations in those paragraphs on orders that amend the
18 agreement. So I think it's clear to me that the parties very
19 carefully documented this transaction and I agree with you that
20 they left room for the order concept. But the order better be
21 pretty clear as far as what it states if you're going to still
22 pursue this contention that DASLC obligated itself -- I'm not -
23 - I'm sorry -- MobileAria obligated itself to cap the
24 megahertz. It may have been good business for it recognizing
25 that it replaced someone and it itself could be replaced to try

1 to make Verizon happy. But that's different than saying that
2 it's bound by a contract. It's one thing to have a happy
3 customer who will renew that contract in the future. It's
4 another thing for that customer to say you breached my
5 contract.

6 So anyway, I don't think we need to hear anymore on
7 this because it's really a question of establishing at least a
8 basis for going forward with the claim in the first place. You
9 know, there's a lot of law on this in the context of secured
10 creditors asserting claims against consumers where Courts
11 require affidavits and the documents. It's the same here. You
12 really need to do that. So I'm going to give you -- when is
13 the next omnibus day?

14 MR. BUTLER: December 20th, Your Honor.

15 THE COURT: And when's the one after that?

16 MR. BUTLER: January 25th -- 25th, I believe.

17 THE COURT: All right. The debtor's response date
18 should be ten days -- should be January 15th -- that's a
19 weekday. Yeah, that's a Tuesday. So the hearing on this would
20 be the twenty-fifth omnibus day. And you should file your
21 amended proof of claim by December 17th which is a Monday.

22 MR. LADDIN: That's what day of the week? I don't
23 have my --

24 THE COURT: Monday. And serve it on Mr. Berger.

25 MR. LADDIN: We will do that.

1 THE COURT: Okay. Thank you.

2 MR. LADDIN: Thank you, Your Honor.

3 MR. BERGER: Thank you, Judge.

4 THE COURT: And obviously, that will cover the other
5 elements of the claim, too. If there's some support for the
6 contentions about the trucks not being there or being there --
7 you know, the issue about -- the other two elements of the
8 claim --

9 MR. LADDIN: Yeah.

10 THE COURT: I need an affidavit that says that's in
11 fact the case.

12 MR. LADDIN: No, that's fine, Your Honor. It clearly
13 is. Those are factual disputes and we'll set that out in more
14 detail.

15 THE COURT: Okay. And my guess is, if there is such
16 an affidavit with backup, Mr. Berger will be speaking with you
17 about those elements of the claim and in all likelihood the
18 hearing on that element of it will be adjourned either to
19 independently reconcile them in an informal way or for you all
20 to have a discovery schedule because there's no sense on having
21 a hearing on a non-evidentiary basis if there actually is an
22 evidentiary issue.

23 MR. LADDIN: That's right. With respect to timing,
24 could we have until the 18th, Your Honor, the Tuesday?

25 THE COURT: That's fine.

1 MR. LADDIN: Okay. Thank you.

2 THE COURT: But since we're getting near the
3 holidays, by 4 on the 18th.

4 MR. LADDIN: That's fine. Thank you.

5 THE COURT: Okay.

6 MR. BUTLER: Your Honor, the next matter on the
7 agenda is matter number 7. It's the twenty-second omnibus
8 claim objections filed by the debtor at docket number 10738.
9 As in the past, Your Honor, we have received various responses
10 and we have also in this particular case -- elected to withdraw
11 two of the objections that we had originally filed.

12 There were 131 proofs of claim on the objection on
13 various procedural and substantive bases. There are two
14 objections that the debtors have chosen to withdraw. One is
15 with respect to the claims filed by UniSeal. And the other one
16 is with respect to the claim filed by Contrain (ph.) Funds, LLC
17 or Airmark.

18 The Airmark -- the Contrain Airmark -- our claim
19 number is 10389 and we have agreed to withdraw that because
20 Contrain has agreed to actually withdraw it in a separate
21 stipulation. So that's how that's been resolved.

22 And with respect to the UniSeal claim, that's claim
23 number 1916, and that -- we're withdrawing that because that's
24 been involved -- taken up in some respects in our caps dealing,
25 dealing with suppliers and caps order, and we will be filing in

1 our twenty-fourth omnibus claims objection a motion to modify
2 that claim consistent with the caps agreement. So we've taken
3 that off of this particular omnibus objection.

4 That leaves, Your Honor, 129 proofs of claim. There
5 are thirty-two proofs of claim for which we've received
6 responses. This is different than what we filed in our omnibus
7 reply yesterday. We received additional response overnight and
8 consistent with our understanding with the Court, when we
9 receive response, even if it's not timely, we still take it off
10 of this track and put it into the claims track. So that means
11 there are thirty-two proofs of claims that should be adjourned
12 pursuant to the responses. That leaves ninety-seven proofs of
13 claim to address at this hearing.

14 The responses that we are adjourning into the claims
15 track, there are actually thirty responses covering the thirty-
16 two proofs of claim. And those assert liquidated claims for
17 approximately forty-three and a half million dollars. The
18 ninety-seven claims we're dealing with at this hearing asserted
19 liquidated claims of approximately 28.9 million. Of that,
20 we're asking Your Honor today to expunge thirty-eight of those
21 claims with an asserted amount of approximately 1.7 million.
22 And with respect to the other fifty-nine claims that assert
23 approximately 27.2 million dollars for the claims, we're asking
24 to modify those claims on various bases, including modifying
25 the identity of the debtor and the class and the amount of the

1 claim and in some cases reducing the asserted amount of the
2 claims. That would, if Your Honor grants the relief requested,
3 reduce those claims to nineteen million dollars in the
4 aggregate or an approximate aggregate reduction of 8.2 million.

5 So again, as in prior matters, Your Honor, when we've
6 dealt with the omnibus objections at omnibus hearings, we're
7 asking Your Honor today for relief as to the ninety-seven
8 proofs of claim as to which no objections have been received
9 and to move the thirty-two proofs of claim into the claims
10 track and then we'll have the other two objections that we will
11 have withdrawn, as I've described on the record.

12 THE COURT: Okay. And as to the ones that are
13 covered by the order, each of those parties got the individual
14 notice contemplated by the claims procedure?

15 MR. BUTLER: Yes. We've been doing the
16 particularized notice, Your Honor. And we will also, if Your
17 Honor grants the relief requested, send out particularized
18 notice as to the relief received.

19 THE COURT: Okay. All right. Does anyone want to
20 address this omnibus motion? All right. I'll grant the
21 omnibus motion as modified as sought on the record and as
22 reflected in the modified order to either disallow or modify
23 the treatment of those claims by claimants who have not opposed
24 the relief sought. And that's based not only on their lack of
25 an objection but also the statements regarding those claims in

1 the motion. So you can submit that order.

2 MR. BUTLER: Thank you, Your Honor. Your Honor, one
3 other matter with respect to claims, just on this record, and
4 that is I did want to indicate to the Court that the debtors
5 have been studying very carefully amended Bankruptcy Rule 3007
6 which I think one can adduce, although it's not specifically
7 stated, I think one can adduce this to be applied to all
8 pending cases as of December 1, 2007 because the amended
9 bankruptcy rules don't provide anything to the contrary, unlike
10 the BAPCA implementation procedures. And so we're assuming
11 they're applicable to this case. And there are, under the
12 amended Rule, there is a specific authorization for debtors to
13 seek relief from the Court or to seek guidance from the Court
14 on the implementation of that Rule as to the particular case.
15 And as with other bankruptcy rules, there's always the ability
16 of the company to ask the Court to reconcile the requirements
17 of the rules as to the administration of the rule in the
18 particular case.

19 So I wanted Your Honor to know that we're going to be
20 filing a motion to amend our claims procedures order on Friday
21 to be heard at the December 20th hearing date to ask Your Honor
22 for guidance on reconciling amended Bankruptcy Rule 3007
23 against our current claims procedure order in this case.

24 THE COURT: Okay. I mean, I could tell you that my -
25 - the underlying point of that Rule is to give claimants notice

1 and adequate notice. And, frankly, I think what you're doing,
2 as far as the particularized notices, is more than the rule
3 requires. But I'm happy to hear that motion.

4 MR. BUTLER: Your Honor, I'm actually hopeful that
5 Your Honor, when we file the motion at the end of the day, that
6 we will be able to continue our current procedures. Because we
7 think they are with Your Honor early on in this case one in
8 particularized notice and we've been doing that. So I think
9 that we probably far see the amended Rule. But the point for
10 us is we simply didn't want to have an ambiguity in this record
11 and then have all of a sudden objections based on --

12 THE COURT: No, I understand that.

13 MR. BUTLER: -- noncompliance of the rules. So --

14 THE COURT: I understand that. That's fine.

15 MR. BUTLER: So we will be filing that on Friday for
16 consideration.

17 THE COURT: Okay. In other words, I think you can
18 still have omnibus objections as long as people get
19 particularized notice.

20 MR. BUTLER: Thank you, Your Honor, for that
21 guidance.

22 THE COURT: Okay.

23 MR. BUTLER: Your Honor, the last matter on today's
24 agenda, now moving as matter number 8, this is Internet
25 Corporation's motion for payment of administrative expenses.

1 There are a small number of exhibits before I cede the podium
2 to Mr. Dragich for their argument. There are a small number of
3 exhibits that I believe there's no objection to in terms of
4 being put into the record which was Exhibit 1 is Intermet's
5 motion for payment of the administrative expense claim and the
6 various exhibits. Exhibit 2 is our objection with the various
7 evidentiary exhibits, the contracts and so forth, the
8 settlement agreements. And then the prior joint stipulation
9 between the parties that Your Honor signed at docket number
10 9696. But seeing as this argument in part relates up to the
11 documents between the parties, we wanted to move those matters
12 into evidence. There is no objection, I believe.

13 THE COURT: No opposition?

14 MR. DRAGICH: No objection, Your Honor.

15 THE COURT: Okay. Can I start with a point the
16 debtors raised towards the end of their objection that I don't
17 think you've had a chance to respond to, which is why isn't
18 this claim barred by the settlement agreement from August?

19 MR. DRAGICH: Your Honor, for the record, David
20 Dragich from Foley & Lardner on behalf of Intermet Corporation.
21 In response to your question, the claim -- Intermet's claim,
22 whatever its character, whether it's administrative or a pre-
23 petition claim, is not barred or waived as a consequence of the
24 settlement agreement. Your Honor, if we turn to the debtor's
25 objection in paragraph 14, it recites the language of the

1 settlement agreement. And the very last three lines, let's
2 say, it provides that the debtors release or waive the claims
3 arising out of events, causes, acts, statements or omissions --

4 THE COURT: Well, you left --

5 MR. DRAGICH: -- which occurred before --

6 THE COURT: You left out some language. The release
7 says "The releasing parties" -- which would include Intermet --
8 "further release and waive any right to assert any other claim,
9 cause of action, demand or liability of every kind and nature
10 whatsoever, including those arising under contract statute or
11 common law whether or not known or suspected at this time which
12 relate to the claim in which the releasing parties have, ever
13 had or hereafter shall have against the debtors based upon
14 arising out of, related to or by reason of any event, cause,
15 thing, act, statement or omission occurring before the petition
16 date." And I'm assuming what the debtors contend is that this
17 is at least related to the 2003 contract since that's what
18 gives rise the right to a rebate -- refund, a refund of the
19 rebate. I mean, I understand. If it said -- but the word
20 "related to" is pretty broad.

21 MR. DRAGICH: Well, Your Honor, it depends. I agree
22 that it's broad. But it says related to or by any reason of
23 any event, cause, thing or omission occurring -- it relates to
24 those acts or omissions before -- that occurred before the
25 petition date. It's our position, Your Honor, that the act or

1 the omission, Delphi's failure and cessation of ordering parts
2 from Internet, was a post-petition act not one --

3 THE COURT: But isn't the "thing" -- you know, they
4 use that word "thing", too. Isn't the "thing" the contract?

5 MR. DRAGICH: The contract is what defines the
6 parties' obligation but the breach or the termination -- it's
7 our view was the post-petition -- arose from the post-petition
8 conduct of the debtor.

9 THE COURT: And it has no relation to the "thing" --
10 to the contract?

11 MR. DRAGICH: Well, it's an obligation of the
12 contract so, yes.

13 THE COURT: So it relates to it.

14 MR. DRAGICH: We're reading -- Internet and the
15 debtors read the clause differently, Your Honor.

16 THE COURT: Okay.

17 MR. DRAGICH: And that is that it's our view the
18 "related to" is not relates to the contract. It relates to the
19 act or omission. And if it's the act or omission that we're
20 addressing, that's the post-petition omission by the debtor to
21 order the steering knuckles under the supply agreement from
22 Internet.

23 THE COURT: Okay.

24 MR. DRAGICH: Your Honor seems relatively familiar
25 with the background. Would you like a brief recitation of some

1 of the underlying facts, Your Honor, that are not in dispute?

2 THE COURT: Well, let me just -- only one point. And
3 it goes back to the settlement agreement again. What is the
4 relation of this rebate agreement to the claim that was filed?
5 Was the rebate agreement related to the provision of the
6 products and services that were covered by the claim?

7 MR. DRAGICH: I don't recall, Your Honor. I can't
8 answer that as I sit here -- stand here.

9 THE COURT: Okay. Okay. All right.

10 MR. DRAGICH: Your Honor, what -- the factual issues
11 are largely agreed to between the parties as far as entry into
12 the supply agreement, entry into the rebate agreement and what
13 the rebate requires of the parties. So I won't repeat those
14 here. What the parties have agreed to do with respect to the
15 claim, if Your Honor allows the claim, whether it be
16 administrative or pre-petition, the amount of that claim has
17 not yet been reconciled. The debtor has not said outright that
18 there is no claim -- or no claim. Whether it should be allowed
19 or not is a separate issue. But the parties have agreed that
20 if Your Honor grants a claim, whether it be administrative or
21 pre-petition, that an evidentiary hearing be scheduled for the
22 next omnibus hearing to determine what that amount is.

23 THE COURT: Okay.

24 MR. DRAGICH: Your Honor, what we request is that the
25 Court allow an administrative claim pursuant to the obligations

1 of the rebate agreement. Intermet views this as a post-
2 petition administrative claim because it arose solely because
3 of the debtors' post-petition conduct, its termination of the
4 supply agreement. Your Honor approved a sale today regard the
5 Saginaw Chassis asset sale motion. And that sale sold
6 substantially all of the assets that the debtor used in
7 supplying General Motors pursuant to the GMT 900 program.
8 Intermet in turn supplied Delphi pursuant to that program. So
9 if Delphi is no longer supplying at all as a result of that
10 sale, there has been a termination of the contract that in 2007
11 September, just a couple months ago, at that time, the debtors
12 ceased ordering parts from Intermet. But for two years --

13 THE COURT: Well, see, you're not saying they've
14 actually formally terminated but they're in anticipatory breach
15 in essence?

16 MR. DRAGICH: We believe, Your Honor, they've
17 terminated by their conduct. And we've sent them ---

18 THE COURT: At a minimum it would be anticipatory
19 breach, I guess.

20 MR. DRAGICH: Which we've given a notice pursuant to
21 our letter prior to this motion. The motion itself could be
22 deemed a notice of termination as a consequence of that breach.
23 They clearly, Your Honor, are not going to be ordering
24 additional parts from Intermet. They no longer supply pursuant
25 to that program.

1 The purpose behind this concept, Your Honor, under
2 503 of the Code is to encourage parties to continue to do
3 business with the debtor on a post-petition basis. This
4 section assumes that if the debtor commits a post-petition
5 breach as part of that ongoing relationship, the nondebtor
6 party will be protected. It will be protected because it will
7 be awarded a resulting administrative claim. That's what
8 Intermet requests today, Your Honor.

9 THE COURT: How does this further that policy?

10 MR. DRAGICH: Your Honor, for two years
11 post-petition -- so almost two years. From October 2005 until
12 September 2007, Intermet performed under that contract. That
13 entire contract, when viewed in total, imposed upon the debtor
14 the obligation if it didn't order the minimum requirements to
15 refund that advanced rebate that was previously paid by
16 Intermet. That was a central component of the contract.
17 Intermet relied on all terms of the contract in providing a
18 benefit to the debtor for almost two years during the
19 bankruptcy proceeding.

20 THE COURT: How's that different from the pension
21 years in McFarland's Race Elevator? They worked for the debtor
22 post-petition.

23 MR. DRAGICH: But, Your Honor, as --

24 THE COURT: But --

25 MR. DRAGICH: I'm sorry.

1 THE COURT: -- the Court said that the consideration
2 for the particular claim that was asserted to be an
3 administrative claim was provided pre-petition.

4 MR. DRAGICH: Can you repeat your question, Your
5 Honor. I'm not sure I followed that.

6 THE COURT: Well, those people worked post-petition.
7 And they were paid for their post-petition work. And they were
8 paid for their -- the portion of their post-petition pension
9 that came due post-petition for the post-petition work. But
10 the second circuit said the claim based on pre-petition
11 consideration, even though it accrued post-petition, was a pre-
12 petition claim. And even though they were working post-
13 petition. They were under a contract that covered the whole --
14 you know, pre- and post-petition period. But the Court said
15 this consideration they already provided by their hours worked
16 pre-petition. Therefore it's a pre-petition claim.

17 MR. DRAGICH: I think the situation here is different
18 though, Your Honor, because in this instance Intermet has
19 provided value to the debtor post-petition in the form of
20 continuing its supply.

21 THE COURT: They were working. I mean, there's
22 nothing more valuable than having an employee show up at the
23 office and do his or her job.

24 MR. DRAGICH: Agreed, Your Honor. And they were paid
25 for that labor. Like Intermet was paid for the goods that it

1 shipped. However, the difference is, Your Honor, is that here
2 we're dealing with a commercial contract. And all of the
3 commercial terms are relevant as far as inducing the parties to
4 act. In this instance, Intermet assumed and performed the
5 contract on the basis that the debtor would return performance.
6 Meaning, they were only willing to assume the risk of
7 continuing supply if the debtor would then also perform its
8 obligation if it didn't fulfill the minimum requirements.

9 THE COURT: Did Intermet move to compel assumption or
10 rejection of the contract?

11 MR. DRAGICH: It didn't, Your Honor, because -- nor
12 did the debtor reject the contract. If the debtor truly wanted
13 to relieve itself of the obligations within the rebate
14 agreement or the underlying supply agreement, it could have
15 rejected the contract. It didn't do that. It simply --

16 THE COURT: It didn't assume it, though, either, did
17 it?

18 MR. DRAGICH: No, Your Honor. By its conduct, it
19 breached the contract and in our view terminated. The whole
20 purpose of the contract is now gone, Your Honor, because the
21 debtor no longer supplies General Motors pursuant to that
22 program. So there would be no business purpose for the debtor
23 to assume a contract that it's not performing.

24 Just moving to one other issue raised in the debtors'
25 objection, Your Honor, I think I've addressed our view on the

1 waiver issue pursuant to the settlement agreement. I'd also --
2 the debtor also argues in the objection that Internet somehow
3 waived its claim by failing to file a proof of claim. The
4 debtor contends that Internet had merely a contingent claim.
5 If Your Honor accepted that view, every party in this case,
6 every nondebtor party to an executory contract would have to
7 file a proof of claim irrespective of whether there's been a
8 pre-petition breach. Surely that's not a requirement that the
9 Court would impose on each and every nondebtor party to a
10 contract. At the time of the filing, at the time of the bar
11 date, there had been no termination of the contract and
12 therefore Internet would not have reason to file a claim. So
13 for that reason, Your Honor, Internet believes it had not
14 waived the claim in any way as far as failing to file a proof
15 of claim because it wasn't required to. And second, the
16 settlement agreement does not constitute a waiver because it
17 deals solely with acts or omissions of the debtor giving rise
18 to a claim that were pre-petition. And it's our view that the
19 acts that gave rise to the claim in this instance were post-
20 petition. Thank you, Your Honor.

21 THE COURT: Okay.

22 MR. BUTLER: Your Honor, I only have a couple of
23 observations. The first observation is that I understand Mr.
24 Dragich's need to argue what he does which this -- and he
25 relies in looking at Exhibit 2-B, the settlement agreement, and

1 at the relevant paragraph there that Your Honor discussed on
2 the record with him. And he relies on the words before the
3 petition date which is a concession as we're concerned that
4 if -- that he's saying all these acts occurred after the
5 petition date and somehow were not related because I think it's
6 a concession by Internet that if in fact it was before the
7 petition date, they are barred by the settlement agreement and
8 they did not file any other proof of claim. The proof of claim
9 that has -- so they're either barred by the bar date order or
10 they're barred by their own signature on a settlement
11 agreement.

12 THE COURT: Well, I don't see how they'd be barred by
13 the bar date order because the bar date order gives a -- you
14 haven't rejected this contract yet.

15 MR. BUTLER: Right. Your Honor -- that's correct,
16 Your Honor, but the reality is that if people have specific
17 claims, for example, I mean -- and I know the facts are in
18 dispute here and I think that among the facts that are not in
19 dispute just so the record indicates, Your Honor, the 417,200
20 dollars is, I think -- the debtors would concede the
21 appropriate calculation under the contract. But that relates
22 to -- the vast majority of that relates to transactions that
23 occurred in the pre-petition period. And Internet knows that
24 as well.

25 THE COURT: Well, that's -- I'm sorry. That's why I

1 asked -- I didn't ask this correctly. This rebate agreement is
2 just -- there's this one-page agreement. Is it incorporated in
3 some other executory contract where they were supposed to be
4 providing this knuckle?

5 MR. BUTLER: No. As I understand it, Your Honor, the
6 rebate agreement was part of the original undertaking back in
7 200 -- I think it's 2003, if I remember the exact date.

8 THE COURT: I'm not sure it matters. It goes to the
9 bar date issue. If it's part and parcel of an agreement that's
10 still executory and hasn't been rejected, then I think they
11 have more time to file a proof of claim. If it's a stand alone
12 document, I think you're probably right, that they were
13 obligated to file a proof of claim because a big portion of it
14 is pre-petition. And liquidated.

15 MR. BUTLER: Yes, Your Honor.

16 THE COURT: But it's just not clear to me whether it
17 is part of -- whether it's a stand alone agreement or whether
18 it's actually a rider to or an exhibit to or incorporated in an
19 ongoing agreement.

20 MR. BUTLER: Your Honor, I mean, they haven't -- this
21 is their proof of claim, their motion. I mean, I know the
22 facts -- the facts of the case are it is a stand alone
23 agreement. It relates to the transaction. It relates to it.

24 THE COURT: Well, that's a separate issue about
25 whether --

1 MR. BUTLER: I know, but that's the point. And --

2 THE COURT: Yeah.

3 MR. BUTLER: And that's sort of observation number
4 one. Your Honor, observation number two is that Internet knows
5 the law here. They know the law applicable to this and it's
6 not what they just argued before Your Honor. They understand
7 Ace Elevator, Your Honor's case. They understand second
8 circuit law and they understand that administrative priority
9 claims require that the claim arise out of a post-petition
10 transaction on the part of the debtor and be allowable only to
11 the extent that the consideration supporting the claim is right
12 to payment was both supplied to and beneficial to the debtors'
13 estate and the operation of its business from the Ace Elevator
14 Company case. And the reason we know that is because they
15 themselves -- Internet Corporation was a debtor itself in
16 Chapter 11. That is exactly the lines they used in fighting
17 all of the administrative claims in their case. And we filed
18 an example of that, which is now before Your Honor as Exhibit
19 2-A, the Internet objection -- their omnibus objection to
20 claims in their case that was filed. So Internet knows the
21 law.

22 THE COURT: Do you know, did they win on that one?

23 MR. BUTLER: Yeah. I have no idea what the outcome
24 was.

25 THE COURT: Okay. I mean, because if they did, you

1 may have a judicial estoppel point. Otherwise --

2 MR. BUTLER: But it states -- well, it's their
3 position. It's not -- I don't know what their judgm -- whether
4 the judge agreed.

5 THE COURT: No, I know.

6 MR. BUTLER: It certainly indicates what their view
7 is.

8 THE COURT: It's the difference between shrugging
9 your shoulders and say well, I felt that one day but I feel it
10 different today and actually being estopped as a legal matter.

11 MR. BUTLER: Yeah. I haven't gone through the -- and
12 sought what the order was. My -- I suspect in fact that they
13 did win it but we certainly could find out, Your Honor.

14 THE COURT: Okay.

15 MR. BUTLER: But that's certainly -- Internet knows
16 the issue. And then finally, whether or not they themselves
17 were judicially estopped based on that position they've taken
18 in their cases, the fact is they can't -- this claim can't
19 survive as an administrative claim under the law here in the
20 second circuit and in this district.

21 THE COURT: Okay.

22 MR. BUTLER: There is no question here that this did
23 not arise out of a pre-petition transaction. We agree with Mr.
24 Dragich the facts are the facts and they've been indicated
25 here. This was a December 12th, 2003 letter agreement. The

1 rebate was advanced at that time. The majority of the
2 production here occurred in 2004 and 2005 prior to the Chapter
3 11 being filed. There was never an attempt by them to seek
4 assumption of the contracts. Other parties have. Your Honor
5 knows there is a contract assumption procedures process here in
6 this case that suppliers insisted on. They never availed
7 themselves of any of those issues. And while it's true the
8 debtors have not terminated this contract, this contract may
9 well to the extent that it has no benefit to the estate be
10 rejected and then the rejection would be considered under the
11 Bankruptcy Code a pre-petition rejection not an administrative
12 act. There is no administrative act here.

13 And I just don't see either under the case law
14 applicable in this district or under the actual facts of this
15 case or given the failure of Internet to protect any interest
16 it might have with respect to the executory contract in this
17 case for the last two and a half years to come in and now say
18 oh, well, it can't be a pre-petition claim so now it's got to
19 be administrative because that's the only way we can win is
20 something, Your Honor, that the Court should dispose of. Thank
21 you.

22 THE COURT: Okay.

23 MR. DRAGICH: Your Honor, may I address --

24 THE COURT: Yeah. You could stay there if you're --
25 that's fine.

1 MR. DRAGICH: Okay. Thank you, Your Honor. Just
2 with respect to the pleading that the debtors attached that
3 Intermet filed in its own case, Your Honor, I don't think we
4 have a disagreement as to what the law says. And I think we
5 accurately cited it in our papers in our case.

6 THE COURT: I'm not going to hold it against you.

7 MR. DRAGICH: Well, Your Honor, I'd like to just
8 explain, Your Honor, our position on that because I think it
9 bears responding to the debtors' remarks.

10 If the debtor engages in a post-petition act that
11 causes the nondebtor party damages, it's our position that the
12 creditor is entitled to an administrative claim. If the
13 nondebtor party provides value to the debtor post-petition and
14 the debtor accepts that benefit, we believe that the nondebtor
15 party is entitled to administrative claim. That's what our
16 papers say.

17 How you apply the facts of the situation in the
18 Intermet case and here is the issue where we disagree. In that
19 case, Your Honor, just very briefly, there were services
20 rendered by sales representatives pre-petition. And the
21 argument in that case by the representatives was that the
22 debtor, Intermet in that case, post-petition failure to renew a
23 contract gave rise to administrative claims. So we're talking
24 about totally different facts, Your Honor, and that's why we
25 believe the cases are not on the same issue.

1 THE COURT: But this -- you have to admit this is not
2 a tort, right? They didn't burn down Intermet's building, as
3 I'm reading in Brown. The wrong here is a breach of a
4 contract, isn't it?

5 MR. DRAGICH: Agreed, Your Honor. Post-petition
6 breach is our view.

7 THE COURT: Well, all right. Of a contract that
8 hasn't been assumed.

9 MR. DRAGICH: Correct, Your Honor. We believe it's
10 been terminated by the debtors' conduct.

11 THE COURT: All right. Okay. All right. Intermet
12 Corporation seeks allowance as an administrative claim of its
13 right to a refund under a 2003(e) pre-petition agreement with
14 Delphi Automotive Services -- Systems, excuse me, LLC, DAS LLC.
15 As is clear from the claim and from oral argument, that claim
16 is premised upon the alleged post-petition breach of that
17 agreement. The agreement has not been assumed by DAS LLC nor
18 rejected. However, Intermet contends that with the sale, which
19 I've approved today, of the Saginaw Michigan operation, DAS LLC
20 is at least an anticipatory breach of the agreement and that it
21 is no longer capable of being performed further without their
22 being a refund owed under it.

23 It appears from Exhibit C to the motion for
24 administrative expense payment that a large portion of the
25 refund is attributable to pre-petition conduct of DAS LLC in

1 addition to being based upon a pre-petition agreement.

2 As was noted at oral argument, although it was
3 asserted that this element of the agreement was important to
4 Intermet, Intermet has never moved in this case to compel
5 assumption or assignment of the -- I'm sorry, assumption or
6 rejection of the agreement under the procedures previously
7 adopted by the Court for such requests.

8 The debtor objects to the administrative expense
9 claim on two main grounds, at least the two grounds that I'm
10 going to focus on. The first, is that the administrative
11 expense claim is barred as having been released by Intermet
12 pursuant to a settlement agreement that it entered into in
13 August of this year with Delphi Corporation on behalf of itself
14 and certain of its U.S. affiliates, including DAS LLC. In that
15 agreement, the releasing parties, which include Intermet,
16 agreed upon the allowed amount of a large claim that had been
17 failed by Intermet, roughly 3.7 million dollars, as a pre-
18 petition general unsecured claim. And then provided for a
19 further release and waiver of any right "to assert any other
20 claim, cause of action, demand or liability of any kind and
21 nature whatsoever including those arising under contract,
22 statute or common law, whether or not known or suspected at
23 this time which relate to the claim that was settled and which
24 the releasing parties have, ever had or hereafter shall have
25 against the debtors based upon arising out of, related to or by

1 reason of any event, cause, thing, act, statement or omission
2 occurring before the petition date."

3 I think two points are worth noting in respect of
4 this release. First, it is a release not only of claims, which
5 may be susceptible to a somewhat narrow definition but might
6 not apply to administrative expense claims. But also releases
7 the right to assert any liability of any kind or nature
8 whatsoever including those arising under statute. And of
9 course, the basis for asserting an administrative expense is
10 under Section 503(b) of the Bankruptcy Code.

11 Second, as discussed at oral argument, the release is
12 broadly written to apply to any such rights that Internet may
13 have or hereafter shall have by recognizing rights arising in
14 the future, i.e., during the post-petition period. Arising out
15 of, based upon or related to by reason of any event, cause of
16 action, thing, act statement or omission occurring before the
17 petition date.

18 Internet contends it can get out of this release or
19 that this release doesn't cover its administrative expense
20 claim because the administrative expense arises post-petition.
21 However, it is very clearly related to and by reason of a pre-
22 petition thing, the defining agreement, that gives rise to the
23 right to the refund, which is the 2003 contract. And it is at
24 a minimum related to that agreement since that's how the
25 calculation of the claim is made based upon the terms of the

1 rebate agreement or the refund provided for in the 2003
2 agreement.

3 So I conclude, based on a reading of the settlement
4 agreement, that Internet has released this claim -- or this
5 administrative expense claim.

6 I will, however, address the other argument that the
7 debtor made here in opposition to the administrative expense
8 claim which is that even if the administrative expense claim
9 had not been released, it would not be entitled to
10 administrative expense treatment. I believe that that argument
11 is correct. The law on what constitutes an administrative
12 expense is quite clear in the second circuit and the parties
13 essentially acknowledge that with one exception that I should
14 deal with first. The cases cited first and foremost by
15 Internet are cases involving post-petition torts or other
16 wrongful activity separate and apart from the breach of the
17 contract. And those cases, i.e., *Reading Company v. Brown*, 391
18 U.S. 471 (1968) and *Pennsylvania Department of Environmental*
19 *Resources v. Tri-State Clinical Labs, Inc.*, 178 F.3d 685 (3d
20 Cir. 1999), therefore, really are not applicable here. The
21 Courts in those cases were dealing with the problems of
22 permitting a debtor to commit a tort or other wrongful activity
23 other than the breach of a contract post-petition. And having
24 that -- the victim of that wrongful activity nevertheless
25 compensated in so-called tiny bankruptcy dollars. And

1 obviously for the correct and good reasons concluded that that
2 would not be proper and therefore provide for an administrative
3 claim for such wrongful activity.

4 Here, however, the right as claimed by Intermet to
5 have its breach claim treated as an administrative expense is
6 determined by those cases that deal with the rights of parties
7 to unassumed and unrejected executory contracts to assert a
8 claim for administrative expense treatment. And those cases
9 are clear that the claimant has a tough burden to sustain its
10 right to priority treatment under Section 503(b) which provides
11 for administrative expense priority for the actual necessary
12 cost and expenses of preserving the estate. As the Supreme
13 Court stated in *Howard Delivery Service, Inc. v. Zurich*
14 *American Insurance Co.*, 126 Supreme Court 2105 (2006), "to give
15 priority to a claimant not clearly entitled thereto is not only
16 inconsistent with the policy of equality of distribution, it
17 dilutes the value of the priority for those creditors that
18 Congress intended to prefer."

19 Given that well-established principle, the Courts in
20 this circuit have set forth a test for the allowance of an
21 administrative expense claim including on behalf of a party to
22 an unassumed and unrejected executory contract. That party
23 must demonstrate, one, that its claim arose from a transaction
24 with or on account of consideration furnished to the debtor-in-
25 possession; and, two, the transaction or consideration directly

1 benefited the debtor-in-possession. And the reference to the
2 debtor-in-possession there is key. It's not the debtor, i.e.,
3 the pre-petition debtor but the post-petition debtor. Here,
4 the transaction was with the pre-petition debtor under the 2003
5 contract and, more importantly, the consideration provided the
6 600,000 dollars was provided pre-petition. Therefore, there
7 was no inducement by the debtor-in-possession in return for
8 that consideration.

9 The fact that it is alleged at least that Intermet
10 continued to provide the steering knuckle sets post-petition is
11 no different to my mind than the fact that the employees of Ace
12 Elevator or McFarlands continued to work post-petition. The
13 particular claim that they were asserting and that Intermet is
14 asserting is premised upon the provision of pre-petition
15 consideration under a pre-petition agreement. And
16 consequently, under the law of this circuit, and I believe
17 everywhere else would be therefore treated as a pre-petition
18 claim if it were not waived. See generally *In re Patient*
19 *Education Media, Inc.*, 221 B.R. 97 (Bankr. S.D.N.Y. 1998) which
20 I believe is the most favorable case to a claimant in
21 Intermet's position but clearly under the reasoning of Judge
22 Bernstein in that case, would not accord the administrative
23 expense status to someone in Intermet's position. See also *In*
24 *re Ace Elevator*, 347 B.R. 473 (Bankr. S.D.N.Y. 2006) and the
25 cases cited therein including specifically Trustees of

1 Amalgamated Insurance Fund v. McFarlands, Inc., 79 F.2d 98 (2d
2 Cir. 1986).

3 So, for those separate and independent reasons, each
4 of which would justify denial of the motion, I'll deny the
5 motion. So, Mr. Butler, you can submit an order to that
6 effect.

7 MR. BUTLER: Yes, Your Honor, we will. Your Honor,
8 that completes the matters set for the omnibus agenda today.

9 THE COURT: Okay. Thank you. Let's hope we all get
10 over our colds.

11 MR. BERGER: Yes, Your Honor.

12 (Whereupon these proceedings were concluded at 11:30
13 a.m.)

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2 I N D E X

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4 E X I B I T S

5 DEBTORS' DESCRIPTION ID. EV.

6 1 Debtor's Declaration in support of
7 Saginaw Chassis asset sale motion
8 settlement

9 2-3 Agreements, including amendments, 31 31
10 in connection with Saginaw Chassis
11 asset sale motion

12 4-11 Court documents relating to Saginaw
13 Chassis asset sale

14 12-14 All service notices relating to sale 31 32

15 1 Internet's motion for payment of 34 4
16 administrative claims

17 2 Debtor's objection to Internet's 35 6
18 motion plus evidentiary exhibits

19 3 Prior joint stipulation 35 8

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1 **I N D E X, CONT'D**

2

3 **R U L I N G S**

4 **DESCRIPTION** **PAGE** **LINE**

5 **Saginaw Chassis asset sale motion granted**

6

7 **Twenty-second omnibus claim objection** **32** **20**
8 **granted pursuant to modified agreement**

9

10 **Motion of Intermnet Corporation for payment** **53** **3**
11 **of administrative expenses denied**

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2 C E R T I F I C A T I O N

3

4 I Lisa Bar-Leib, court-approved transcriber, certify that the
5 foregoing is a correct transcript from the official electronic
6 sound recording of the proceedings in the above-entitled
7 matter.

8

9 November 30, 2007

10 Signature of Transcriber

Date

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12 Lisa Bar-Leib

13 typed or printed name

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